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In the Supreme Court of the United States

OCTOBER TERM 1958

No. 495

WORCESTER NORTH SAVINGS INSTITUTION,
PLAINTIFF, APPELLEE,

v.

SOMERVILLE MILLING COMPANY,
MacNEIL BROS. COMPANY,
ANGUS M. MacNEIL,
JOSEPH A. MacNEIL,
UNION HEIGHTS OIL CO., INC.,
JOHN E. DORIS,
JAMES T. MacNEIL,
DONALD M. MacNEIL,
DEFENDANTS, APPELLANTS.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW HAMPSHIRE

JURISDICTIONAL STATEMENT

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Appellants appeal from the judgment of the Supreme Court of the State of New Hampshire entered June 6, 1958 decided May 29, 1958, dismissing or overruling the exceptions of the defendants. They submit this statement to show that the Supreme Court of the United States has jurisdiction of this appeal and that a substantial question is presented.

Opinion Below

The opinion below is reported in 141 A 2nd 885. Copy of said opinion is attached hereto as Appendix B.

Jurisdiction

This suit was brought in the Superior Court of New Hampshire. Decree was entered for the plaintiff. Appeal was duly taken to the Supreme Court of New Hampshire. The jurisdiction of the Supreme Court of the United States to review this decision by direct appeal is conferred by Title 28, United States Code, Sections 1257 (2) (3).

Questions Presented

1. The effect of the Soldiers and Sailors Civil Relief Act upon the facts in this case. Whether or not compliance by the Plaintiff with said Act is a prerequisite to the validity of a foreclosure of a mortgage of real property in which persons in the armed services have an interest.

2. The denial by the State Courts of New Hampshire to give full faith and credit to the decrees and judgments of the Courts of the Commonwealth of Massachusetts.

3. The denial of the requisites of the Bankruptcy Act of the United States by the State Courts of New Hampshire.

4. The reviewing without due process decisions ex post facto on matters already adjudicated by a Court of competent jurisdiction of another State.

5. The denial by the Courts of New Hampshire of due process of law by adjudicating rights of persons not made parties and given notice and opportunity of being heard.

Statutes Involved and Constitutional References

Bankruptcy Act U.S.C. Title 11. Sections

United States Constitution Amendment Fourteen.

United States Constitution (full faith and credit clauses)

U.S.C. Title 50 App. Section 532.

The Statement of Facts and the statement of the allegations that the issues involved are substantial.

Statement of Facts by the Appellants

The Somerville Milling Company, a Massachusetts corporation, gave to the Plaintiff in 1950 a real estate mortgage in the usual form covering a certain parcel of land with the buildings thereon located in Brookline, N. H. The mortgagor thereafter conveyed the said parcel to MacNeil Bros. Company, a Massachusetts corporation. Thereafter the said MacNeil Bros. Company conveyed the said parcel to the Union Heights Oil Company, a Massachusetts corporation. All of said transfers were made subject to the aforesaid mortgage held by the plaintiff. Prior to 1955 a second mortgage was given on said real estate to several persons, all Massachusetts citizens, among whom were Donald M. MacNeil, James T. MacNeil and John E. Doris. The said mortgage was never recorded, but prior to the attempted foreclosure sale mentioned herein later, notice of said mortgage was given to the Plaintiff. The three individuals named above, were members of the armed forces of the United States. That on July 20, 1955 the plaintiff caused notices of foreclosure to be inserted in the newspapers, for the purported breach of the conditions of the said mortgage. The dates of publication were July 23, July 25 and August 1, 1955 and the scheduled date of sale August 25, 1955. Copies of said notice were mailed to the original maker of the mortage and note, the endorsers; and to MacNeil Bros. Company as subsequent holder of the equity in said real estate. No notice was given to the present title holder of the premises, Union Heights Oil Company, although its deed had been duly recorded months prior to said publication. Nor was any notice mailed to Donald M. MacNeil, James T. MacNeil or John E. Doris.

Thereafter, on August 24, 1955 the defendants, John E. Doris, James T. MacNeil and Donald M. MacNeil, filed a bill in Equity seeking to restrain the foreclosure sale. On the return of the order of notice with temporary restraining orders, the Court refused to issue an interlocutory injunction. The case was never tried upon its merits.

The plaintiff first learned on October 18, 1955 of the transfer of title to Union Heights Oil Company, although the deed to said corporation had been duly recorded on February 18, 1952 at the Registry of Deeds for Hillsborough County, New Hampshire.

A Petition for redemption from the mortgage had been filed at the Superior Court for the County of Middlesex, Massachusetts on October 18, 1955 under the provisions of the General Laws of the Commonwealth of Massachusetts; Chapter 244.

The Plaintiff is a Massachusetts corporation. It appeared generally to said suit in the Superior Court as aforesaid case #19282. Said suit has not yet been reduced to a decree.

The Plaintiff brought a suit in the Superior Court for Worcester County, Massachusetts in January 1955 seeking leave to foreclose the subject mortgage under the provisions of the Federal Soldiers and Sailors Civil Relief Act, U.S.C. Title 50 App. Section 532 et seq. The said Court issued notice to the original mortgagor and several of the present defendants not including the Union Heights Oil Company. The defendants in the armed services were denied leave to intervene and have their rights determined in said suit.

Thereafter, prior to September 1955 a so-called final decree was entered in said suit 112664. That after the said Court vacated the final decree as aforesaid, the Plaintiff herein applied to the said Court on August 27, 1956 or thereabouts by motion seeking leave to foreclose the

mortgage subject matter of this suit and in which this present suit it is contending that it had already validly foreclosed the same mortgage. That thereafter the Superior Court for the County of Worcester, Massachusetts, entered a final decree granting to the present plaintiff the right in terms to foreclose the said mortgage. This long after this present suit had been entered in this Court. The said decree necessarily determined the fact that there was a valid mortgage in existence unforeclosed and subject to foreclosure.

On November 1, 1955 about one o'clock in the afternoon an involuntary petition in bankruptcy was filed in the United States District Court for the District of Massachusetts against the title holder of the subject real estate, Union Heights Oil Company. The Plaintiff was immediately notified and about one o'clock, it had received actual notice of the said filing of said petition. The alleged sale was thereafter held without special authority from the said Bankruptcy Court. The said petition is still pending, no adjudication or dismissal was ever made by said Court. The case is numbered at said Court 704-55. On November 1, 1955, the Plaintiff caused a so-called foreclose to be made under the aforesaid conditions. No notice of these conditions was publicized at the time and place of said alleged sale. The above are the highlights of the factual basis of this review. Other facts will appear in the arguments of counsel.

I

The alleged foreclosure sale was invalid and void for the reason that: The Union Heights Oil Company, not the named defendant (Union Heights Oil Co., Inc.) was never served with process in this case and did not appear voluntarily before the Court. R. p. 66, line 30, line 40.

In the absence of service of process and opportunity to

be confronted with the allegations made before being subjected to any decree is a denial of due process of law. See *Windsor* v. *McVeigh* in 93 U.S. Reports.

II

The sale was illegal and void for the reason that there was no notice to the title owner of the property to be foreclosed in accordance with the requirements of statute. See R.S.A. 579; 25. No notice of any kind was given to the representative of the mortgagor as required even though the plaintiff was advised of the said corporation owning the said real estate by the Petition for redemption filed in October 1955 at Middlesex County Superior Court to which petition the Plaintiff herein responded by general appearance long before the date of the sale. R. p. 53, lines 20-25. The defendants request the Court to take judicial notice of all proceedings in the Courts of Massachusetts State and Federal referred to in all parts of the brief herein. The said suit at Middlesex County is numbered 19282 eq.

The deed to the said owner was duly recorded in February 1952. R. p. 18, lines 30-35.

The life of the owning corporation under Massachusetts law extends for three years after dissolution and thereafter until pending litigation is terminated. See G. L. c. 162, section 31; see R. p. 46, lines 20-24.

III

The sale is illegal and void for the reason that: The Courts of New Hampshire must give full faith and credit to the judicial actions of the Courts of Record of the other states of the United States. The Superior Court for Worcester County in case 112664 had under its jurisdiction the necessary parties hereto and the subject matter before the Courts of New Hampshire stepped in. The said

Courts of New Hampshire must stay their hand while the Courts of Massachusetts are operating. The Constitution of the United States demands full faith and credit.

The Superior Court of Worcester County on September 11, 1956 in said case 112664 there pending determined in effect that the mortgage was still in existence and subject to being foreclosed. This is contrary to the prayers of the Plaintiff herein. He is asking the Courts of New Hampshire to reverse by collateral proceedings the decrees of the Superior Court of Massachusetts in a matter within its jurisdiction. This is contrary to the requirements of the Constitution pertaining to full faith and credit. See R. p. 75, lines 10-40 and exhibits.

IV

The sale was illegal and void for the reason that the title to said real estate subject of said mortgage came under the protective umbrella of the Bankruptcy Court of the United States for the District of Massachusetts on November 1 at 1:30 p.m. and notice was immediately given to the plaintiff. Thereafter it was powerless to foreclose without specific leave of the Bankruptcy Court. Said leave has never been granted by said Court. See case 704-55 there pending. See *Meyer* v. *Rosen*, 181 F.2nd 715; Bankruptcy Court under the Statute acquired exclusive jurisdiction of the property of the debtor and foreclosure proceedings were automatically stayed by statute and foreclosure sale made thereafter is absolutely void. It will be noted that prior to the changes in the law in 1938 a different construction was given to certain clauses in the said Act.

V

The sale is illegal and void for the reason of failure of the plaintiff to obtain prior approval under the Soldiers

and Sailors Civil Relief Act. U.S.C. Title 50, Section 532.

The defendants, Donald M. MacNeil, John E. Doris and James T. MacNeil were beneficiaries of the said Act. No leave was obtained from the Superior Court of Hillsborough County nor from the U.S. District Court for the District of New Hampshire. Thereafter the sale is void. See *Twitchell* v. *Home Owners Loan Corporation*, 122 P2nd 210.

The Plaintiff could not take the law into his own hands and disregard the mandate of the People of the United States; nor can this Court legalize the illegal acts of the Plaintiff. The said Courts cannot imbue with life a right that does not have any vitality in itself. The law was violated and the Plaintiff must stand the consequences of its known illegal acts. It acted with knowledge and therefore its Acts are the more inexcusable. The alleged foreclosure violated the said laws of the United States and therefore are acts which are completely void of legal effect. A person cannot predicate any rights in himself arising out of his own illegal conduct. Every act, which is criminal cannot constitute any basis for the establishment of legal rights. The foreclosure violating the provisions of Title 50 App. sec. 532 of the United States Code, is a void act.

VI

It is elementary that the first Court taking jurisdiction of the subject matter, cannot be interfered with by any subsequent tribunal, with the single exception of the U. S. Courts of Bankruptcy. The property subject matter of this litigation came into custodia legis of the Superior Court for Worcester County, Massachusetts by the voluntary submission of suit 112664 by the Petitioner herein, in January 1955. The said Court must be unhampered in its actions by the Superior Court of Hillsborough County, New Hampshire until at least after final decree is entered

in Worcester and the decree returned to Court as satisfied in full. Issue is not discussed here as to the right of the Courts of New Hampshire to render ancillary aid to the decree of the said Court in the enforcement thereof.

The property of the defendants being in custodia legis, this Court is without jurisdiction to adjudicate the rights litigated in Massachusetts.

VII

As the interests of the representatives of the U. S. Court for Massachusetts may be involved in this suit, the Court is without power to hear and determine the issues herein without notice and opportunity to be heard being given to the said U. S. Court at Boston or the person constituting its representative in this matter in case 704-55 there pending. U. S. Constitution.

Conclusion

The Defendants-Respondents state in conclusion that the decision in this suit must be for dismissal of the Petition. There has been interference by the Courts of New Hampshire with the progress of litigation in the Courts of Massachusetts both State and Federal. The Plaintiff-Petitioner herein instituted most of it. It selected its forum and must be bound by the decrees of the Court by it selected. Furthermore, the Courts of New Hampshire as all other State Courts are bound to enforce and uphold the Federal Laws and Constitutiton. They must give way to the exclusive jurisdiction of the U. S. Courts in matters of Bankruptcy. Therefore, the attempted foreclosure while the subject property was in custodia legis is void and confers no rights upon the Plaintiff.

There is no issue raised of adequate notice being received by the Plaintiff concerning the suits in Massachusetts and therefore it cannot claim to be the innocent victim

of unknown circumstances. It deliberately violated the laws of the State and Nation and now is seeking relief from the effects necessarily flowing from said violations. This would be beyond the powers of the Court.

All in all the Petition should be abated and a decree entered dismissing the suit forthwith on each and every ground stated herein.

Respectfully submitted,

(s) ANGUS M. MACNEIL

Counsel for Petitioners

Appendix A.

UNITED STATES CONSTITUTION

ARTICLE IV, SECTION 1:

> Full faith and credit shall be given in each State to the public acts, Records and Judicial Proceedings of every other State. And Congress may by General Laws prescribe the manner in which such Acts, Records and Proceedings shall be proved, and the effect thereof.

AMENDMENT FOURTEEN, SECTION 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

UNITED STATES CODE TITLE 11, CHAPTER 7, SECTION 110 excerpt therefrom

> a) The trustees of the estate of a bankrupt and his successor or successors, if any, upon his or their appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt as of the date of the filing of the petition in bankruptcy or as of the original petition proposing an arrangement or plan under this Act except . . . (not material)
>
> . . . A person having actual knowledge of such pending bankruptcy shall be deemed not to act in good faith unless he has reasonable cause to believe the petition in bankruptcy is not well founded . . .

UNITED STATES CODE TITLE 50 APP., SECTION 532 (3)

> No sale, foreclosure or seize of property for nonpayment of any sum due under any such obligation, or

for any other breach of the terms thereof, whether under a power of sale, under a judgment entered upon warrant of attorney to confess judgment contained therein or otherwise, shall be valid if made after the date of enactment of the Soldiers and Sailors Civil Relief Act Amendments of 1942 and during the period of military service or within three months thereafter, except pursuant to an agreement as provided in Section 107 (Section 517 of this Appendix) unless upon an order previously granted by the Court and a return thereto made and approved by the Court.

Appendix B.

A True Copy.
Attest: GEORGE J. SHOWVAN
Clerk of the New Hampshire Court

Hillsborough,
No. 4651.

WORCESTER NORTH SAVINGS INSTITUTION
v.
SOMERVILLE MILLING COMPANY & a.

Argued May 6, 1958.
Decided May 29, 1958.

BILL IN EQUITY, to quiet title to certain real estate located in the town of Brookline in this state. RSA 498:3. The plaintiff obtained title to the real estate at a foreclosure sale under its power of sale mortgage executed by the named defendant by Angus M. MacNeil, president, to the plaintiff. Trial by the Court resulted in findings and rulings that the plaintiff's mortgage, foreclosure sale and foreclosure deed were valid, and that various mortgages, recorded and unrecorded, of the defendants were junior and inferior to the fee simple title of the plaintiff. The Court's decree also stated that the plaintiff's title to the real estate was free, clear and discharged of all claims of all defendants.

One of the defendants, Angus M. MacNeil, appeared as attorney for all the defendants. The defendants filed a plea in abatement, a motion to dismiss *sua sponte*, a motion for dismissal of action, a motion "to vacate decrees and dismiss petition" and a motion to "dismiss proceedings as adjudicated." The defendants' exceptions to the denial of these motions and the Court's decree were reserved and transferred by *Grant*, J. Additional facts appear in the opinion.

Burns, Calderwood, Bryant & Hinchley (*Mr. Calderwood* orally), for the plaintiff.

Angus M. MacNeil (by brief and orally), *pro se*, and for the other defendants.

KENISON, C.J. It is hornbook law that the validity and effect of conveyances and mortgages of real estate are determined by the law of the state where the real estate is located. Goodrich, Conflict of Laws (3d *ed.*) *ss.* 148, 152. The same rule is applied to the validity, method and effect of a mortgage foreclosure. N.H. Anno. Restatement, Conflict of Laws, *s.* 227; 2 Beale, Conflict of Laws, *s.* 227.1. The fact that the corporate defendants were organized in Massachusetts and that the other defendants are resident therein is clearly immaterial since the proceeding to quiet title is local in character and governed by the law of this state. *Bancroft* v. *Conant*, 64 N.H. 151. The Trial Court correctly ruled that New Hampshire was the proper jurisdiction to determine the validity of the mortgage foreclosure which was the basis of the plaintiff's title. *Bryant* v. *Morrison*, 44 N.H. 288.

The defendants claim the foreclosure sale is void because the last title owner of the property, Union Heights Oil Company, did not receive notice of the sale. After the named defendant, Somerville Milling Company, had mortgaged the property to the plaintiff, it conveyed its interest by a deed bearing no revenue stamps to MacNeil Bros. Company. Later MacNeil Bros. Company conveyed its interest by deed bearing no revenue stamps to Union Heights Oil Company. The defendant, Angus M. MacNeil, was president and director of these three corporations. The Union Heights Oil Company as well as the Union Heights Oil Company, Inc. had been dissolved by decree of the Supreme Judicial Court of Massachusetts in 1954, prior to the foreclosure sale on November 1, 1955. It is undisputed that notice of the foreclosure sale was sent to

the mortgagor, Somerville Milling Company, and as a matter of law that was sufficient. RSA 479:25 II; *Armille* v. *Lovett*, 100 N.H. 203.

As a matter of recommended procedure the record shows that notices were also sent to MacNeil Brothers Company, Angus M. MacNeil, and to the Union Heights Oil Company by sending the notice "to Angus M. MacNeil, the last president of Union Heights Oil Company before its dissolution." *Armille* v. *Lovett, supra.* This was notice above and beyond the call of legal duty. Pertinent but not definitive of this point is the holding in *State* v. *Cote*, 95 N.H. 108, 112: "If the defendant . . . chose to do business under a myriad of interlocking trade-names and corporations and kept the records so combined and inter-related that they cannot be distinguished, he cannot complain because they are treated as basically impersonal and corporate rather than personal and private." The defendants' exception based on lack of proper notice is without merit.

Another argument advanced by the defendants in their brief is quoted in full: "The alleged foreclosure sale was invalid and void for the reason that; The Union Heights Oil Company, not the named defendant (Union Heights Oil Co. Inc.) was never served with process in this case and did not appear voluntarily before the Court. R. p. 66 line 30—line 40. In the absence of service of process and opportunity to be confronted with the allegations made before being subjected to any decree is a denial of due process of law. See Windsor v. McVeigh in 93 U.S. Reports." The argument is in effect that the bill in equity named the wrong defendant and therefore the proceedings are invalid as against the holder of the equity of redemption. The answer to this is that the Trial Court could and did allow an amendment to correctly name Union Heights Oil Company as party defendant. *Bourget* v. *Company*, 97 N.H. 193, 194; *Remick* v. *Company*, 82 N.H. 182, 184.

The attorney for the defendants was president, director and organizer of both corporations and it could be found that justice required the action taken.

It is claimed that the defendants Donald M. MacNeil, John E. Doris and James T. MacNeil, as holders of an unrecorded second mortgage, are beneficiaries under the Soldiers and Sailors Civil Relief Act, 50 U.S.C.A., (app.) *s.* 532, and that foreclosure sale is in violation of this statute. The mortgage has not been produced in court, there is no evidence that these defendants are in the military service and there are no facts showing that the statute is applicable to this case. Consequently there is no basis for this court to make any determination under the statute.

Various other objections are urged by the defendants to the effect that the New Hampshire court has no jurisdiction of this proceeding to quiet title. However, they are predicated on statements and arguments of counsel rather than evidence except for preliminary and inadequate documents which fail to show any lack of jurisdiction or erroneous rulings by the Trial Court. All the defendants' exceptions have been considered but we find nothing in the record to indicate that they should be sustained. Accordingly the order is

Exceptions overruled.

All concurred.